Nos. 53-78

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD,
Petitioner

vs.

WOOSTER DIVISION OF BORG-WARNER CORPORATION

WOOSTER DIVISION OF BORG-WARNER CORPORATION,
Cross Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-AFL-CIO) AS AMICUS CURIAE.

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Interest of Amicus Curiae

The International Union, United Automobile, Aircraft & Agricultural Implement Workers of America (UAW-AFL-CIO), hereinafter referred to as the International, filed

8 (a)(1) and (5) unfair labor practice charges on April 7, 1953, initiating the issuance of the complaint in this matter. An amended charge was filed on July 1, 1953 adding 8 (a)(3) violations. The National Labor Relations Board, hereinafter referred to as the Board, found both 8 (a)(1) and 8 (a)(5) violations, however it rejected a Trial Examiner's finding of 8 (a)(3) violations on the ground that he was in error in concluding that 8 (a)(3) violations for failure to reinstate were supported by a finding of an unfair labor practice strike caused by the employer's insistence on certain contract proposals found violative of Section 8 (a)(5).. The Board, contrary to the Trial Examiner, held that the strike was caused by the failure of the parties to reach agreement on economic issues in dispute. The Board's failure to find 8 (a)(3) voilations was the subject of a petition for a review filed by the International. In respect to this phase of the case the Court of Appeals remanded the case to the Board stating:

> "The union contends that in any event the unfair labor practice of the compnay was a contributing cause of the strike which as a matter of law requires that the strike be treated as an unfair labor practice strike. That such is the legal consequence of such a factual situation appears settled. (citations) The burden rested upon the company to show that the strike would have taken place even if it had not insisted upon its recognition proposal. (citation) We do not construe the findings of the Board as including an express finding on this factual issue. Counsel for the Board apparently so concedes by his statement in the brief that 'the Board in effect found' such to be the case. We agree with counsel for the union that the Board's findings are inadequate with respect to this issue which is controlling on the question of reinstatement. The

union also challenges the validity of the agreement under which reinstatement was carried out. On these issues the case is remanded to the Board for further findings and rulings."

Thus, the sustaining of that part of the lower court's remand which may be based upon the findings of 8(a)(5) violations which are the subject of this appeal, will depend upon this court's sustaining the findings. Moreover, if the Board's findings of the 8(a)(5) violations are not sustained, the status of the International as a bargaining representative under the National Labor Relations Act will be imperiled and the measure of its authority and its identity to act as representative of employees will be determined by the magnitude of an employer's bargaining power. Moreover under the guise of collective bargaining the internal management of a labor union's affairs will be exposed to employer interference and domination and the employer, by the possession of superior bargaining power, may dictate a union's mechanics for strike.

Summary of Argument

These appeals involve the legality of so-called "recognition and employee ballot clauses", which by economic pressure an employer was able to fix in a contract. The recognition clause excluded the International as a party to the agreement. The employee ballot clause, as finally embodied in the contract, provided for the "settlement of all disputes that may arise" between the parties through a procedure which provided for "a clear definition of the issue or issues, officially made known to all employees in the bargaining unit;" and "an opportunity for all employees in the bargaining unit to vote, by secret, impartially supervised, written ballot, on whether to accept or reject the Company's last offer, and on any subsequent offers made." Such

ballot was to be taken on company premises. The clause further provided "that if a majority of the employees in the bargaining unit reject the company's last offer, and the company makes a subsequent offer within 72 hours from the time the results of the election are known, another secret, impartially supervised, written ballot will be taken within the following 72 hours." Thus the submission of "subsequent offers" could continue *ad infinitum*. In addition to the above stipulations the ballot clause contained a further provision "that the question of whether or not this agreement is to be amended, modified or terminated is one of the issues subject to vote by such a secret, impartially supervised written ballot." The clause further provided that the foregoing procedure must have been exhausted before the engagement of strike. (See Intermediate Report R. 399a, 400a)

While we support the Board's findings of 8 (a)(5) violations and the reasoning employed by the Board to substantiate its conclusions, nevertheless we believe the Board should have also concluded that the employer's demands for the recognition and employee ballot clauses was *ab initio* unlawful and was illegal *per se* because:

1. The employee ballot clause was a direct interference with the administration of a labor organization in violation of Section 29 U.S.C. 158 (a)(1) and (2) of the Act in that among other things such demand was in effect a demand for an amendment to the Constitution of the International, the certified bargaining agent, by which the employer usurped the right of the International to conduct its own internal affairs without employer interference or domination.

2. The employee ballot clause was a dilution of the authority of the certified bargaining representative in that it transferred bargaining authority to individual

employees in deragation of the authority conferred by the Act upon the certified bargaining representative selected by a majority of the employees to act exclusively on behalf of *all* employees.

3. The employee ballot clause eliminated the International as the bargaining representative over matters involving the final settlement of disputes and grievances, strike resolutions and the amendment, modification and termination of a labor agreement and interfered with the right of the employees to freely select their bargaining agent.

4. The employee ballot proposal discouraged membership in a labor organization in that it delegated to non-members authority to make final decisions in respect to vital subjects for collective bargaining. It reserved to the minority, rights in connection with collective bargaining which are repugnant to the scheme of majority determination.

5. The employee ballot proposal required the involuntary surrender of the International's right to full representative status and required said union to delegate to other than the certified bargaining agent, bargaining authority which is imposed on it by the statute (29 U.S.C. 159 (a)) which it may not delegate except in terms of the statute.

6. The employee ballot clause, which provided for the submission of certain collective bargaining matters to *all* employees for their action imposed upon those employees who may have desired to refrain from union activities participation in collective bargaining in a manner other than that authorized under Section 8 (a) (3), 29 U.S.C. 158 (a) (3) and in contravention of 29 U.S.C. 157 and 158 (a) (1).

7. The employee ballot clause is a derogation of the employer's duty to bargain in conformity with Sec-

tion 8 (d), 29 U.S.C. 158 (d), in that Section 8 (d) requires an employer to bargain with "the representative of the employees" in respect to "any question arising" under an agreement, whereas the ballot clause provides for bargaining in respect to the adjustment of disputes and grievances, resolution of strikes and the amendment, modification and termination of the agreement directly with the employees.

8. The recognition clause provided for the choosing of the bargaining representative by the employer in drogation of the right of employees to choose their own bargaining agent and eliminated the International as bargaining agent.

9. The recognition clause was a refusal to bargain with the certified bargaining representative and was a denial of the representative status of the certified bargaining representative.

10. The recognition clause was the negotiation of the "parties to the agreement" which are fixed by statute rather than the "terms of the agreement."

For these reasons we contend that the employee ballot clause is an *illegal contract term* and comes within the class of cases noted by this court in *National Labor Relations Board* v. *American National Insurance Company*, 343 U.S. 395, Footnote 15, Page 405.

Argument

The employee ballot clause measured by the proscriptions of the Act is clearly an illegal contract term. 29 U.S.C. 158 (a) (2) renders unlawful an employer's domination or interference with the administration of a labor organization. This is also true of a contract procured by domination. *National Labor Relations Board* v. *Pacific Greyhound Lines*, 106 F. 2d 867 (CA-9) (reversed on other

grounds 303 U.S. 272). Whether such domination or interference is effected by contract as in this case or otherwise, is irrelevant since a contract is not a defense against the illegality of an act condemned by the statute. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 47. In the instant case the employer by the use of economic pressure was able to foist upon a union an employee ballot clause which provided a different mechanics for the settlement of disputes and grievances, resolution of strike and the amendment, modification or termination of the contract than was provided in the International's Constitution. (See General Counsel's Exhibit No. 61 and 62, Record 86a to 99a) The ballot clause was a device whereby the International's Constitution was changed thereby enabling the employer to appeal directly to its employees, both members and non-members of the union. If a bargaining representative, who is confronted with superior bargaining power, must succumb as a matter of law (which the court below held) to an employer's dictation of the management of its internal affairs in connection with the settlement of disputes and grievances, strike resolution or the amendment, modification or termination of its contract, a new field for employer exploitation has been opened under the guise of collective bargaining; and "industrial strife or unrest" will be fostered. What self-respecting union will surrender its right to dictate its own mechanics for strike, unless, as in this case, it is driven to the wall. As demonstrated by the prolonged strike in the instant case, negotiations which embrace an interference with the internal affairs of a labor organization or the extent of its bargaining authority do not contribute to the minimizing of labor disputes in interstate commerce, one of the basic objectives of the Act. Thus the effect of the lower court's decision is crystal clear—the control of a union's internal affairs must become subject to the economic power of an employer to sub-

sfitute its will for that of the union. Moreover, if this power is without limitation, the union becomes a potential impotent bargaining implement. Weak unions must become the pawns of employers and the protection afforded by the Act to employees to be represented by a collective bargaining agent of their own choosing has been nullified. This court has recognized that an employer dominated union may be an effective means of obstructing the employees' choice of their own representative. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 266. Moreover, it is significant that a union of the magnitude of the International was finally forced to the wall and in the end a contract fixing certain mechanics of internal operation, contrary to the International's Constitution, was made effective by the employer. The Board lately in the case of *Nassau-Suffolk Contractors Association*, 11 NLRB No. 19, 40 LRRM 1146, has recognized that the "problems of internal union management or government must be resolved by the members themselves."

On the other hand, if the area of collective bargaining is to be expanded so that an employer may demand the submission of certain collective bargaining subjects directly to its employees for disposition, it would appear to follow that a similar clause submitting like questions to the stockholders of the employer could be demanded by a union. We find nothing in the Act which would indicate that Congress intended to open up for industrial conflict, subjects which concern the internal administration of either management or labor. Had Congress intended to provide for the submission of an employer's last offer to all the employees in the bargaining unit, it well knew the method, since in Section 207 (b) 29 U.S.C. 179 (b) Congress provided in cases of national emergency that the National Labor Relations Board take a secret ballot of employees

to determine "whether they wish to accept the final offer of settlement" made by their employer. Clearly the mechanics for the consideration of an employer's last offer was left to the sole discretion of the bargaining representative and was not a subject over which it was intended an employer should have any economic control.

In Volume 79, Part 3, Page 2372, Congressional Record, Seventy-Fourth Congress, First Session, Senator Wagner in discussing the purposes of the Act said:

> "It means simply that the majority may decide who are to be spokesmen for *all* in making agreements concerning wages, hours and other conditions of employment." (Italics ours)

From this language it is clear that the scheme of the Act is to afford to the employees a spokesman who will be designated by a majority of the employees and will speak for *all*. In this respect a bargaining representative not only has a responsibility to those he represents but also has the authority to meet that responsibility. This authority contemplates the exercise of discretion. *Ford Motor Company* v. *Huffman*, 345 U.S. 330, 339. The ruling of the court below requires the union to bargain with the employer over how much of its statutory authority and discretion it may exercise itself and how much it shall be required to delegate to the employees whom it represents. Logic dictates that if a union were to delegate by contract with an employer *all* of its authority as bargaining representative to the employees whom it represents, it would have been eliminated as the bargaining representative during the period of the contract. The employee ballot clause is clearly an elimination of the International as the bargaining agent, since during the period of the contract and *thereafter for as long as a majority of the employees vote against the modification, amendment or termination of the contract,*

the International is eliminated as the bargaining agent of the employees in respect to the final settlement of disputes and grievances, strike resolution and the modification, amendment and termination of the agreement. Such an elimination of the International as the bargaining agent is not unlike the elimination of the bargaining agent in the unlawful contracts referred to in *National Licorice Company* v. *National Labor Relations Board*, 309 U.S. 350, 360. As in that case the contract clause in the instant case was a means adopted to "eliminate the union as the collective bargaining agency of its employees." Moreover the clause was also an unlawful attempt to "go behind the designated representatives, in order to bargain with the employees themselves." *Medo Supply Photo Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 685. Indeed the "complete loyalty" demanded of a bargaining representative, *Ford Motor Company* v. *Huffman, supra*, negates the idea that any of a bargaining agent's exercise of discretion may be gated to others.

The National Labor Relations Board has established the principle that a contract which provides for the exclusive control of seniority in the hands of a union is an unfair labor practice. *Pacific Intermountain Express*, 107 NLRB 836. This principle was affirmed in *Pacific Intermountain Express* v. *National Labor Relations Board*, 225 F. 2d 343 (CA-8) and *National Labor Relations Board* v. *Dallas General Drivers*, 228 F. 2d 702 (CA-5). The ground for such illegality was that such provision "tends to encourage membership in the union." The Act bans both encouragement and discouragement. A condition of employment which permits a non-union member to exercise discretion in connection with the settlement of disputes, strike resolution and the modification, amendment and termination of contracts, would tend to discourage membership in a labor organization since there would be small recompense

in his becoming a member of the union if non-members were permitted to participate in regard to these "vital" subjects of collective bargaining. The foregoing cases therefore are authority for holding the ballot clause illegal.

In *National Labor Relation Board* v. *Pecheur Lozenge Company*, 209 F. 2d 393, 403 (CA-2) the court held that an employer may not condition his statutory duty to bargain upon the abandonment of a strike. The realities of the industrial world indicate that there is no difference between collective bargaining conditioned upon the abandonment of a strike and collective bargaining conditioned upon a delegation of the right to strike to other than the statutory agent. In either case the bargaining agent abandons the right to strike. Indeed this court recognizes that the right to strike may not be bargained away unless "*the selection of the bargaining representative remains free.*" *Mastro Plastic Corporation* v. *Labor Board*, 350 U.S. 270, 280. The surrender of the union's right to strike in the instant case was conditioned on the abrogation of employees freedom to select the bargaining agent to act for them in the premises. Rather than the employees freely selecting their bargaining agent to act for them in these matters, the employer by superior bargaining power selected it for them. In fact, the employee ballot clause deprives the employees of the right to designate an agent to bargain for them not only in respect to the resolution of strikes but also the final settlement of disputes, or the amendment, modification or termination of the contract. As to these subjects the employees must refrain from utilizing their bargaining agent. In this respect it is not unlike the case of *National Labor Relations Board* v. *Vincennes Steel Corporation*, 117 F. 2d 169, 172, which struck down a proposed plan "which binds the employees to refrain from requesting a raise in wages," on the ground that "It deprives the employees of the right to designate an agent to bargain with reference thereto."

The cases of *National Labor Relations Board* v. *Corsicana Cotton Mills*, 178 F. 2d 344 (CA-5) and *National Labor Relations Board* v. *Darlington Veneer Company*, 236 F. 2d 85 (CA-4), are authority for reversing the lower court's decision. In the *Corsicana* case the employer demanded clauses similar to the clause in the instant case. The clauses provided that all employees of the company, whether they belonged to the union or not, must be given notice of union meetings. A further requirement was that "no decision of the union as the bragaining agent shall be determined except on majority vote of all the employees who attend such meeting." The court held these clauses "withheld recognition from the union as bargaining agent." In the *Darlington Veneer Company* case the company demanded clauses which required that the proposed contract was to be ratified by a majority of the employees in the bargaining unit by secret ballot and was to be nullified in the event over 50 percent of the employees revoked their checkoff authorizations. Since the employee ballot clause provides that the contract shall continue until such time as the majority of the employees authorize a modification, amendment or termination of the contract, it would appear therefore as in the *Darlington Veneer* case, the term of the contract is dependent upon other than the decision of the bargaining agent. Moreover, under the employee ballot clause, an amended or modified contract could not become effective until ratified by a majority of the employees in the bargaining unit.

The court below cited *Allis-Chalmers Manufacturing Company* v. *National Labor Relations Board*, 213 F. 2d 374. The facts are readably distinguishable. As we understand the *Allis-Chalmers* decision, the court reasoned that if a bargaining representative has the authority to waive the right to strike, an employer may demand that the bargaining representative delegate that authority to the employees

in the bargaining unit. We do not believe that the bargaining agent's limited authority to waive strike, *Mastro Plastic Corp.* v. *Labor Board, supra* implies that the bargaining agent may delegate that authority or impair the right of the employees to freely select the bargaining agent to act exclusively for them; nor may an employer make such a demand of the bargaining agent. An employer's demand is not unlike a situation where a foreign nation by force and arms should impose upon the United States Government a condition that the United States may not declare war unless such declaration is approved by a majority of the people in the United States. Clearly such an act by a foreign power would be in derogation and a dilution of the right of the representatives of Congress under Article I, Section 8 of the Constitution to declare war and act as representatives of all the people. Yet no doubt Congress could agree with another nation to outlaw war. Similarly the bargaining agent may agree not to strike under certain circumstances; however, under the scheme of the National Labor Relations Act the authority to determine whether a strike shall be declared may not be delegated to others. Indeed, if the *Allis-Chalmers* case is authority for sustaining the court below, then there has been reserved to the minority, rights in respect to collective bargaining which are repugnant to the scheme of majority determination. Clearly such was not the intent of Congress since in those areas in which Congress believed that the individual employees needed protection from the majority, it did legislate. (See 29 U.S.C. 159 (a) on individual grievances)

The court below appears to have grounded its conclusion that the employee ballot proposal was permissible on the premise that since the union agreed to the ballot proposal the bargaining was done with it and not with the employees. Such conclusion necessarily assumes the union's authority to make such agreement for which there is no

statutory support. *Nor does the court consider that subsequent bargaining over the subjects covered by the ballot clause will not be with the union.*

The court distinguishes the *Medo Photo Supply Corporation* v. *National Labor Relations Board*, 321 U.S. 678 on the ground that the attempt to go behind the designated representatives in that case was without the consent of the representatives. Such conclusion of the court not only erroneously assumes that the bargaining representative has the authority to delegate the duties and responsibilities imposed upon it by statute but that an employer may not only demand but force a union by superior bargaining power to delegate its authority over certain subjects of collective bargaining to others. Nor does the lower court consider that in the instant case the union's consent was coerced. Thus the employer in effect selected the bargaining agent, whereas it had the duty "to treat with no other" than the certified bargaining agent. *Medo Photo Supply Corp.* v. *National Labor Relations Board, supra,* 684.

The effect of the lower court's decision means that a partial delegation of bargaining authority is approved. If the statute is construed so that a bargaining representative may delegate a part of its authority upon the demand of an employer, we fail to find any limitations in the statute which would deprive it of delegating all of its authority. Similarly if an employer, as in the instant case, may require that certain subjects of collective bargaining be submitted to its employees, then we find no proscription in the statute against the employer's requiring that its employees ratify the entire agreement. Thus the lower court's distinguishing of *Corsicana* case, *supra,* may not be supported. If, as the court below asserts "the non-union employees are permitted to express their views on only one phase of the con-

tract, which was a matter of such vital importance as to justify an expression of their views'' supports the conclusion that the employee ballot clause is legal, obviously there is no statutory proscription against their expressing their views on each phase of the contract; moreover we fail to find a statutory definition of matters of ''vital importance.'' The delegation of bargaining authority approved by the court below would defeat the statutory plan of majority representation. The statutory scheme undoubtedly anticipates that in regard to these matters the employee will express himself at union meetings. In fact, the provisos of 8 (a)(3) encourage employee participation in union affairs, but not outside the union.

Section 7 of the Act, 29 U.S.C. 157 guarantees to each employee ''the right to refrain from any or all'' concerted activities for the purposes of collective bargaining or other mutual aid or protection. Interference with this right is an unfair labor practice and illegal under 29 U.S.C. 158 (a)(1). The employee ballot clause requires the submission of certain subjects of collective bargaining, i.e. the settlement of disputes and grievances, strike resolution and the amendment, modification and termination of the contract to employees who may or may not desire to refrain from engaging in concerted activities. The clause requires the publication of the issues of any dispute to all employees. We submit that the employee ballot clause is a device employed by the employer not only for the purpose of circumventing the bargaining agent in reference to the matters therein covered, but was intended to inject in such matters the participation of employees who did not desire to exercise their right to bargain collectively, but would nevertheless register a protest against the union's position.

Section 8 (d) of the Act, 29 U.S.C. 158 (d) defines the

meaning of "to bargain collectively." One of the requirements of "to bargain collectively" is that the employer and the representative of the employees "meet at reasonable times and confer in good faith with respect to * * * any question arising" under an agreement. The Board has held that the employer's obligation to recognize and bargain with a contracting union continues during the period of a contract. *California Footwear Company,* 114 NLRB 764, 769 and cases there cited.

The employee ballot clause is invalid in that it provides for the abrogation of this requirement by the employer in that grievances and disputes arising under the agreement are submitted directly to the employees and the employer is not required to recognize the union as bargaining agent over these issues. The representatives of the employees is rendered wholly impotent in respect to these subjects since the clause provides that *only* the employees may accept or reject the company's last offer or any subsequent offers. Submitting these issues directly to the employees is proscribed by 8 (d) and is illegal.

The recognition clause measured by the proscriptions of the Act is also clearly an illegal contract term. Our consideration of the reasons for this court's holding that the employee ballot clause is an illegal contract term is equally applicable to the recognition clause. The recognition clause contemplates the dictation by the employer of the bargaining agent and the elimination of the bargaining agent as a party to the contract. Such a contract proposal requires the certified bargaining representatives to bargain over the extent of its authority and its identity as the bargaining agent. The employer not only demanded that the International be excluded as a party to the agreement but demanded that its bargaining authority be delegated to a local. As stated by the court below, the status of a repre-

sentative of employees is "acquired by statute and is not within the area of collective bargaining." It is the terms of the agreement which are subject to negotiation under Section 8 (d) rather than the parties with whom the agreement may be negotiated. This seems clear from the examination of Section 8 (d) of the Act, 29 U. S. C. 8 (d), which requires "the execution of a written contract incorporating any agreement reached if requested by either party." "Party" must refer to the certified bargaining representative chosen in accordance with Section 9 of the Act, 29 U. S. C. 159, otherwise such language would have no import. Moreover, Section 8 (d) requires that the employer bargain with the certified bargaining representative in respect to "any question arising" under a contract during its term.

Conclusion

The evil of the decision of the court below in overruling the Board's findings in respect to the employee ballot clause lies in its emasculation of the bargaining power which Congress lodged in the bargaining representative in order to equalize the bargaining power between employees and employers. It was the "inequality of bargaining power" between employers and employees with which Congress was concerned. 29 U. S. C. 151. The lower court's holding in respect to the ballot clause affords a means whereby an employer may interfere with the internal affairs of a labor organization, contrive the mechanics of its strike procedure as well as its settlement of disputes and grievances, and its affirmation or rejection of contracts. Moreover the employer may dictate the residual authority a bargaining agent may exercise after a contract has been signed.

If the Board be reversed a whole new arena of labor combat will be opened where, as in the instant case, industrial unrest and strife will be rampant. The realities of the in-

dustrial world surely dictate that the expertise of the Board in finding 8 (a)(5) violations in this case be credited by this court.

Respectfully submitted,

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